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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-774

PAUL LEE SWEENEY, Executor and Trustee under
the will of GERVAIS JOSEPH SEWELL, Deceased,
Petitioner,

v.

GILBERT R. KNOWLTON, and BOARD OF
SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
Respondents.

**PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN
OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT OF VIRGINIA**

PAUL LEE SWEENEY, Pro Se
3124 North 10th Street
Arlington, Virginia 22201
(202) 393-0907

Counsel for Petitioner

(i)

TABLE OF CONTENTS

	<i>Page</i>
A. INTRODUCTION	1
B. REASONS FOR GRANTING THE WRIT	3
(a) Federal Constitutional Issues Were Raised In The Trial Court And In The Supreme Court Of Virginia	3
(b) Respondents Have, In Effect, Conceded The Uncon- stitutionality Of The Trial Court's Injunctions	8
(c) State Law Does Not Uphold The Injunctions.	8
CONCLUSION	9

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A. INTRODUCTION

The Petitioner, Paul Lee Sweeny, Executor and Trustee under the will of Gervais Joseph Sewell, Deceased, respectfully submits this reply to the respondents' brief in opposition to the petition for a writ of certiorari to the Supreme Court of Virginia. The petitioner would show the Court that most of the contentions made in respondents' brief are false and misleading, are contradicted by the record in this case and are clearly erroneous. Furthermore they have no bearing on the issues whether the injunctions violated defendants constitutional rights. The

petitioner would also represent to the Court that the injunctions entered in the trial court, which the Supreme Court of Virginia refused to review which enjoin Decedent and his successors from selling or removing top soil from decedent's land "*except where allowed by law*", and from dumping or discharging any substance of any type or description on said land "*except those substances which are permitted by law to be discharged*" fail to specify with reasonable certainty and definiteness the conduct which is commanded or prohibited, that is, what must be done or avoided so that a person of ordinary intelligence may know what is thereby required of him, and that, accordingly, said injunctions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Respondents' narrative "Statement of the Case" does not cite any portions of the record to support the same. It is replete with prevarications and erroneous statements which find no support in the record of this case. For example, on page 6 respondents say the trial court enjoined defendant "from operating a landfill or dump on the property" whereas the court actually "temporarily enjoined * * * dumping or discharging of any substance of any type or description on the real property", a vast difference. (Order of January 16, 1976). Furthermore, said narrative "Statement of the Case" has no bearing on whether the trial court's injunctions violated defendant's Fourteenth Amendment rights.

In their brief respondents cite numerous sections of the Virginia Code and some Fairfax County Ordinances, apparently meaning to convey the impression that the same are authority for the injunctions here challenged. None of the State statutes or county ordinances have the slightest bearing on the issues raised in the Petition. *Respondents have been unable to cite any authority of any kind upholding the vague and indefinite language of the injunctions "except which are permitted by law to be discharged" and "except where allowed by law", from which the conclusion is inescapable that there are none.*

Rule 23(1)(f) of this Court was complied with. The matter referred to therein is set forth on pages 8a and 9a of the Appendix to the Petition, as permitted by the language of the Rule which respondents failed to include in their partial quotation (page 8, footnote 8, of respondents' brief); and by the reference appearing at the top of page 4 of the Petition.

B. REASONS FOR GRANTING THE WRIT

(a) *Federal Constitutional Issues Were Raised In The Trial Court And In The Supreme Court of Virginia.*

1. In their brief, respondents say:

"... purported federal constitutional issues were raised for the first time in the petition to this Court . . . (page 2).

2. In their brief, respondents say:

"Respondents submit that the Fourteenth Amendment to the United States Constitution was not involved in the decisions of the courts below, but that no issue concerning the Fourteenth Amendment was ever raised below". (page 2).

1. In the trial court, defendant pleaded, in advance of trial, the following defense to this suit:

"that insofar as said zoning ordinance may purport to prevent the removal of natural products of the soil, or the filling of defendant's land, * * * *the same is unreasonable, unconstitutional and void because lacking in due process of law* (paragraph 5 of defendant's Answer to complainants' Second Amended Bill (emphasis added)).

2. & 3. In the trial court, defendant made the following objections *prior to the entry of the Final Decree:*

"* * * and defendant further objected to so much of said final decree as enjoined sale or removal of topsoil from said property, except where allowed by law, as being too broad as to the persons affected thereby, and *as being too vague and uncertain* * * *; and defendant objected and excepted to that portion of said final decree which enjoined

3. In their brief, respondents say:

"Petitioner's contentions with regard to federal constitutional rights are made for the first time in the petition for writ of certiorari. No constitutional issues of any kind were raised at trial * * *". (page 8).

4. Respondents say in their brief:

"Nor were any constitutional issues presented to the Supreme Court of Virginia for consideration. * * * Nowhere do the words 'due process' or 'equal protection' or similar terms appear. * * *". (page 8).

him from dumping or discharging on said property any substance of any type or description, except those substances which are permitted by law to be discharged, *as being too vague and indefinite, and as denying defendant equal protection of the law and due process of the law* * * *; and defendant objected and excepted to * * * the failure and refusal of the court to dismiss this suit because of the failure of the complainant county to give defendant notice of all claimed violations of the said zoning ordinance and a reasonable opportunity to correct the same, as required by the said ordinance, before the commencement of this suit, *such failure constituting a lack of due process of law herein* * * *. (Defendant's objections to final decree *made orally and in writing prior to the entry of the same in the trial court*, and reduced to writing and filed in the trial court on November 12, 1976; Appendix to Petition for Writ of Certiorari, pages 8a and 9a; emphasis added).

4. In his petition for Appeal in the Virginia Supreme Court, petitioner said (at page 28):

"Defendant contended in the trial court, and now contends in this court, that *the foregoing injunction is invalid because it is too vague and indefinite to apprise defendant of what he may do or may not do (meaning that it violated the due process clause of the Constitution)* * * * (and at pages 30 & 31): There

are many cases which hold that statutes prohibiting the excavation of topsoil *are an unconstitutional exercise of legislative power* * * *. Paragraph 5 of defendant's Answer to complainants' Second Amended Bill specifically raised as a defense thereto *'that insofar as said zoning ordinance may purport to prevent the removal of natural products of the soil, or the filling of defendant's land* * * * *the same is unreasonable, unconstitutional and void because lacking in due process of law* * * * (and at pages 24, 39 & 40): "Complainants have sought to enforce certain provisions of the county zoning ordinance by bringing this suit against defendant, while ignoring other provisions of the same zoning ordinance specifically requiring complainant Knowlton, as county administrator, to first give defendant notice of the alleged violations and a reasonable opportunity to correct the same * * *. It is well settled that *due process requires that there be a hearing prior to taking property* * * * *the proceeding brought by the county - - - in the court below against defendant is lacking in due process* * * *. Defendant should have been issued the landfill permit he applied for and *the refusal of the county to issue him the same denied him equal protection of the law* * * *. The action of * * * county's officials in changing the standards for such permits * * * was clearly arbitrary and capricious and denied defendant equal protec-

tion of the law and due process of law." (emphasis and parenthetical matter supplied).

5. Respondents in their brief say:

"* * * until the petition for writ of certiorari was filed the case contained no hint of a federal question." (page 10).

5. In the Virginia Supreme Court, petitioner said:

"The final order enjoining the sale or removal of topsoil, *except where allowed by law*, and enjoining the dumping or discharging of any substance of any type or description, *except those substances which are permitted by law to be discharged*, deprives defendant's successors of the use of said property without due process of law, and is void on its face" (Petition for Rehearing, Page 2).

"The writ of injunction sets forth no criteria for defendant's successors in interest. It is not plain and certain on its face. *It is vague and uncertain* and defendant's successors are left to speculate and conjecture to determine what amount of topsoil removal is allowed by law and what substances are by law permitted to be discharged." (Id. pp. 3 & 4).

"It is therefore submitted that *the said decree is too vague, uncertain and indefinite to be enforced* and that the same should be vacated or modified to inform defendant's successors what amount of topsoil they may remove, and what substances they may, or may not discharge on said land." (Id. page 4).

"(T)he language of the Court in *Caldwell v. Commonwealth*, 198 Va. 454, 458, referring to statutory enactments applies with all of its vigor to the lower court's decree which may subject defendant's successors to fine and/or imprisonment for criminal contempt. In *Caldwell*, this Court aptly said: 'It is elementary that an act creating a statutory offense, to be valid, must specify with reasonable certainty and definiteness the conduct which is commanded or prohibited, that is, what must be done or avoided, so that a person of ordinary intelligence may know what is thereby required of him. * * * Unless an act creating a statutory offense satisfies this requirement of certainty and definiteness *it violates the Due Process Clauses of the Fourteenth Amendment* and of the Virginia Constitution. Article I, S. 8.'

"It is respectfully submitted the decree complained of fails to satisfy the requirement of certainty and definiteness and *violates the Due Process Clauses of the Fourteenth Amendment* and of the Virginia Constitution, Article I, Section 8, and in the interest of justice it should be changed to define the acts to be done or not to be done with such certainty that a person may determine whether or not he has violated the decree at the time he does or fails to do the act which is charged to be a violation thereof." (Id. pp. 4 & 5; emphasis added).

All references herein to "due process of law" and "equal protection of the law," used herein in the context of state action, mean the Fourteenth Amendment.

(b) *Respondents Have, In Effect, Conceded The Unconstitutionality Of The Trial Court's Injunctions.*

Nowhere in their brief do respondents cite any authority or advance any argument upholding the injunctions of the trial court. In fact, they have failed and refused to even discuss the constitutionality of said injunctions in their present form. They make no claim that they are constitutional, as worded, under any theory of the law. The failure and refusal of respondents to answer the numerous authorities set forth in petitioner's brief, which are unanimous in holding similar injunctions invalid for uncertainty and indefiniteness, is tacit admission that there is no authority upholding the injunctions in their present form and, in effect, constitutes confession of error in the state courts.

(c) *State Law Does Not Uphold the Injunctions.*

There is nothing in the law of Virginia upholding the vague, uncertain and indefinite language of the injunctions in this case, *Caldwell v. Commonwealth*, 198 Va. 454, 458, 94 S.E.2d 537, discussed in petitioner's brief on page 12, makes this very clear. The Virginia court was there discussing statutory enactments, but the same principles must, by analogy, apply to state court injunctions which carry criminal contempt sanctions for violations thereof, as do the injunctions in the case at bar.

CONCLUSION

It is submitted the state court's injunctions as written, are *vague, indefinite and uncertain*, and as such *are unconstitutional on their face*; and that this case should be remanded to the lower court with instructions to define *the amount of topsoil that may be removed and those substances which may or may not be discharged on the land.*

Respectfully submitted,

PAUL LEE SWEENEY, Pro Se,
3124 North 10th Street,
Arlington, Virginia 22201
Counsel for Petitioner.

January 9, 1978